

No. 44285-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Zachary Crawford,

Appellant.

Clark County Superior Court Cause No. 12-1-01628-3

The Honorable Judge Scott A. Collier

Appellant's Opening Brief

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ASSIGNMENTS OF ERROR

1. Mr. Crawford's conviction was entered in violation of his state constitutional right to a unanimous jury.
2. Mr. Crawford's state constitutional right to a unanimous jury was violated by the court's failure to give a unanimity instruction.
3. Mr. Crawford's state constitutional right to a unanimous jury was violated by the prosecutor's reliance on two distinct acts of possession of methamphetamine.
4. The prosecutor committed misconduct that infringed Mr. Crawford's Fourteenth Amendment right to due process.
5. The prosecutor committed misconduct by misstating the law.
6. Mr. Crawford's conviction was based in part on improper opinion testimony, in violation of his right to an independent jury determination of the facts.
7. Officer Gutierrez invaded the province of the jury by providing a nearly explicit opinion on Mr. Crawford's guilt.
8. The evidence was insufficient to prove that Mr. Crawford unlawfully possessed methamphetamine.
9. The prosecution failed to prove that Mr. Crawford possessed a sufficient quantity of methamphetamine to warrant a felony conviction.
10. Mr. Crawford was denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel.
11. Defense counsel was ineffective for failing to object to improper opinion testimony on Mr. Crawford's guilt.
12. Defense counsel was ineffective for failing to object to prosecutorial misconduct in closing.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When evidence of multiple criminal acts is introduced to support a single conviction, the court must give a unanimity instruction unless the prosecution elects a single act upon which to proceed. Here, the evidence suggested that Mr. Crawford possessed methamphetamine on two occasions, and the prosecution relied on both incidents as the basis for the charge. Did the trial court's failure to give a unanimity instruction violate Mr. Crawford's state constitutional right to a unanimous verdict?
2. Prosecutorial misconduct can deny an accused person a fair trial. Here, the prosecutor misstated the law by arguing that jurors could ignore the offense date, an essential element of the charge under the facts of this case. Did the prosecutor's misconduct infringe Mr. Crawford's Fourteenth Amendment right to due process?
3. A "nearly explicit" opinion on the accused person's guilt violates an accused person's constitutional right to an independent determination of the facts by the fact-finder. In this case an officer was permitted to testify regarding Mr. Crawford's state of mind to establish that his possession was not unwitting. Did the opinion testimony invade the province of the jury and violate Mr. Crawford's right to an independent determination of the facts, in violation of his right to a jury trial and to due process under the Sixth and Fourteenth Amendments?
4. To convict Mr. Crawford of simple possession, the prosecution was required to prove that he possessed a sufficient quantity of drugs to warrant a felony charge. At trial, the evidence established only that he possessed methamphetamine residue. Should the court use its common-law authority to require proof that an accused person possessed some minimum quantity of controlled substance before felony liability attaches in simple possession cases?

5. The Sixth and Fourteenth Amendments guarantee an accused person the effective assistance of counsel. In this case, defense counsel failed to object to improper opinion testimony and to prosecutorial misconduct in closing. Was Mr. Crawford denied his Sixth and Fourteenth Amendment right to the effective assistance of counsel?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

Around midnight on September 5th, 2012, Zachary Crawford agreed to allow officers into his home. RP 18-19. He was on supervision with the Department of Corrections, who searched his room. RP 16-19. An empty baggy that had once contained methamphetamine was found under a blanket on his bed. The baggie still had a tiny amount of residue. RP 19-20, 46, 71, 82, 84.

The state charged Mr. Crawford with Possession of Methamphetamine. CP 1. The Information alleged that “on or about September 5, 2012, [he] did unlawfully possess a controlled substance, to wit: methamphetamine...” CP 1.

At trial, Officer Gutierrez testified he was at the house during the search, but did not observe it. RP 53-56. He stated he had been an officer for five years locally, and that he had been a narcotics officer in Los Angeles before moving to Washington State. RP 53. He told the jury that:

In the years of my experience, I’ve noted speaking to people while under cover and also in uniform, the one thing that I do get from users is that if they’re willing to keep it and possess it, then it’s a useable amount. If, for someone who -- someone -- if it wasn’t enough for them, they wouldn’t keep it around at the risk of getting in trouble or arrested, especially if they’re on probation or parole. And that’s basically what I go off of for user amount. RP 60.

Defense counsel raised no objection to the testimony. RP 60.

The prosecution called WSP forensic scientist Catherine Dunn to testify regarding her analysis. Dunn characterized the amount she received and tested as “a residue quantity”. RP 71. She defined residue as visible but not easily weighed, perhaps a milligram or less. RP 73. She clarified that the amount she received was about 1/200th of the common “street quantity” of methamphetamine. RP 74.

Mr. Crawford presented an unwitting possession defense. Court’s Instructions, Supp. CP. He told police upon his arrest, and repeated at trial, that he had purchased methamphetamine on September 4th, 2012. RP 57, 82, 85. He said that he used it all right away, and he was surprised when the officers showed him the baggie. RP 83-84. In fact, Mr. Crawford said that if he had known there was any methamphetamine in the bag, he would have “licked the bag clean.” RP 83.

The court instructed the jury on the elements of the offense, requiring jurors to find that Mr. Crawford possessed methamphetamine “on or about September 5th, 2012.” Instruction No. 8, Supp. CP. The court gave instructions on unwitting possession, but did not provide a unanimity instruction. Court’s Instructions, Supp. CP.

The state argued to the jury during closing argument that:

The Defense wants to say unwitting possession because he -- he says he didn't realize he still had some there. Well, that's not unwitting possession. That's sort of like saying you didn't realize there were still some drops left in your Pepsi can and when you pour it out, that's still Pepsi. Well, if you pour that out, that's still methamphetamine. And he knew it was there, he knew where he got it, he used it, he knew exactly what it was. That's possession of a controlled substance. That's why I'm asking you to convict. The State has proven it beyond a reasonable doubt. I am now asking you to do your civic duty and convict this Defendant.
RP 107.

During his rebuttal closing argument, the prosecutor again emphasized the point:

And when confronted by Officer Gutierrez, he didn't say, "I thought that was all gone. I didn't realize anything was left." He said, "Yeah, that's mine. I bought it at -- I bought it a day ago." That's possession of a controlled substance. That's possession of methamphetamine.
RP 111.

The jury voted to convict. After sentencing, Mr. Crawford timely appealed. CP 2-14, 16.

ARGUMENT

I. MR. CRAWFORD WAS DEPRIVED OF HIS STATE CONSTITUTIONAL RIGHT TO A UNANIMOUS VERDICT

A. Standard of Review.

Constitutional violations are reviewed *de novo*. *McDevitt v. Harborview Med. Ctr.*, No. 85367-3, 291 P.3d 876 (2012). A manifest error affecting a constitutional right may be raised for the first time on

review.¹ RAP 2.5(a)(3); *State v. Kirwin*, 165 Wn.2d 818, 823, 203 P.3d 1044 (2009). A reviewing court “previews the merits of the claimed constitutional error to determine whether the argument is likely to succeed.” *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001). An error is manifest if it results in actual prejudice, or if the appellant makes a plausible showing that the error had practical and identifiable consequences at trial. *State v. Nguyen*, 165 Wn.2d 428, 433, 197 P.3d 673 (2008).

B. Mr. Crawford was denied his right to a unanimous verdict because the prosecution relied on two distinct instances of possession and the court failed to provide a unanimity instruction.

An accused person has a state constitutional right to a unanimous verdict.² Wash. Const. art. I, § 21; *State v. Elmore*, 155 Wn.2d 758, 771 n. 4, 123 P.3d 72 (2005). Before a defendant can be convicted, jurors must unanimously agree that he or she committed the charged criminal act. *State v. Coleman*, 159 Wn.2d 509, 511, 150 P.3d 1126 (2007).

¹ In addition, the court has discretion to accept review of any issue argued for the first time on appeal. RAP 2.5(a); see *State v. Russell*, 171 Wn.2d 118, 122, 249 P.3d 604 (2011). This includes constitutional issues that are not manifest, and issues that do not implicate constitutional rights. *Id.*

² The federal constitutional guarantee of a unanimous verdict does not apply in state court. *Apodaca v. Oregon*, 406 U.S. 404, 406, 92 S.Ct. 1628, 32 L.Ed.2d 184 (1972).

When the state relies on evidence of multiple acts of similar misconduct to prove a single charge, the court must provide a unanimity instruction. *Id.* This requirement “protect[s] a criminal defendant’s right to a unanimous verdict based on an act proved beyond a reasonable doubt.” *Id.* Failure to provide a unanimity instruction violates the state constitutional right to a unanimous jury. Wash. Const. art I, §§ 21 and 22; *State v. Kitchen*, 110 Wn.2d 403, 409, 756 P.2d 105 (1988).

Failure to provide a unanimity instruction creates “the possibility that some jurors relied on one act or incident and some relied on another, resulting in a lack of unanimity on all of the elements necessary for a valid conviction.” *Coleman*, 159 Wn.2d at 512. Such a possibility creates the risk that jurors will improperly aggregate evidence of multiple acts in convicting for a single count. *Id.*

Failure to provide a unanimity instruction requires reversal when the state relies on multiple acts of possession of a controlled substance to prove a single charge. *State v. King*, 75 Wn. App. 899, 878 P.2d 466 (1994) (*King I*). In *King*, the court concluded that the defendant’s possession constituted multiple acts rather than an ongoing course of conduct. *Id.* In reaching this conclusion, the court noted that the acts occurred “at different times, in different places, and involv[ed] two

different containers.” *King I*, 75 Wn. App. at 903.³ Additionally, one of the alleged instances of possession was constructive and the other was actual. *Id.*

Failure to provide a unanimity instruction in a multiple acts case gives rise to a presumption of prejudice. *Coleman*, 159 Wn.2d at 510. The presumption is overcome only if no rational juror could have a reasonable doubt as to either incident for which evidence was presented. *Id.*

The state’s case-in-chief focused exclusively on the allegation that Mr. Crawford constructively possessed the trace amount of methamphetamine found in his bed the night of September 5th or the early morning of 6th. *See generally* RP 40-62. Following Mr. Crawford’s testimony, however, the state argued in closing and on rebuttal that the jury could convict based on his admission that he had purchased and possessed methamphetamine the previous day. RP 107, 111.

As in *King*, the two alleged instances of possession in Mr. Crawford’s case occurred at different times and places. *King I*, 75 Wn. App. at 903. Also like in *King*, one of the instances constituted actual possession while the other was constructive. *Id.* The two instances were

³ Although there was no evidence that Mr. Crawford’s prior possession involved a different container, each of the other factors considered by the *King* court applies in this case.

separate, distinct acts, and required the court to provide a unanimity instruction. *Id.*

The failure to provide a unanimity instruction creates a presumption of prejudice. *Coleman*, 159 Wn.2d at 510. The presumption cannot be overcome in this case because a rational juror could have found a reasonable doubt as to either incident, and could have accepted his unwitting possession defense as to the residue discovered during the search. *Id.*

The only evidence of Mr. Crawford's purchase and possession the previous day was his own testimony. RP 80-83. The alleged constructive possession the night of the search required jurors to find that Mr. Crawford had dominion and control over the trace amount of methamphetamine (discovered in a room that he shared with someone else); it also required them to reject his unwitting possession defense. RP 43, 47, Court's Instructions, Supp CP. A rational juror could have had reasonable doubt as to either incident. *Coleman*, 159 Wn.2d at 510.

The court's failure to provide a unanimity instruction in Mr. Crawford's case requires reversal of his conviction and remand for a new trial. *Coleman*, 159 Wn.2d at 517.

II. PROSECUTORIAL MISCONDUCT DENIED MR. CRAWFORD A FAIR TRIAL.

A. Standard of Review.

Prosecutorial misconduct requires reversal if it is both improper and prejudicial. *In re Glasmann*, 175 Wn.2d 696, 704, 286 P.3d 673 (2012). Misconduct may be raised for the first time on review if it is flagrant and ill-intentioned. *Id.*

B. A prosecutor commits misconduct by making legal arguments that are not supported by the instructions.

Prosecutorial misconduct can deprive the accused of a fair trial. *Glasmann*, 175 Wn.2d at 703-04. A prosecutor's statements during closing argument are reviewed in the context of the total argument, the issues in the case, the evidence, and the jury instructions. *State v. Walker*, 164 Wn. App. 724, 730, 265 P.3d 191 (2011).

A prosecutor's legal arguments must be limited to the law as stated in the court's instructions. *Walker*, 164 Wn. App. at 736. A misstatement of the law by a prosecutor is a "serious irregularity having the grave potential to mislead the jury." *Id.*

1. The prosecutor committed misconduct when he misstated the law of the defense of unwitting possession.

The defense of unwitting possession requires the accused to show by a preponderance of the evidence that he either was not aware that he had a controlled substance in his possession or that he was not aware of the nature of the substance. *City of Kennewick v. Day*, 142 Wn.2d 1, 10-11, 11 P.3d 304 (2000).

The jury at Mr. Crawford's trial was instructed that:

A person is not guilty of possession of a controlled substance if the possession is unwitting. Possession of a controlled substance is unwitting if a person did not know that the substance was in his possession.

Court's Instructions, Supp CP.

Mr. Crawford presented evidence that he did not know that the methamphetamine found in his bed was in his possession. RP 80-84. This evidence was sufficient to persuade the court to instruct the jury on the defense of unwitting possession. Court's Instructions, Supp CP.

Nonetheless, the prosecutor stated in closing that:

The defense wants to say unwitting possession because he – he says he didn't realize he still had some there. *Well, that's not unwitting possession.* That's sort of like saying you didn't realize there were still some drops left in your Pepsi can and when you pour it out, that's still Pepsi. Well, if you pour that out, that's still methamphetamine. And he knew it was there, he knew where he got it, he used it, he knew exactly what it was. That's possession of a controlled substance.

RP 107 (emphasis added).

This argument conflates the two prongs of unwitting possession by claiming that possession cannot be unwitting if the accused is aware of the

nature of the substance. *Day*, 142 Wn.2d at 10-11. The prosecutor's argument directly contradicts the jury instruction on unwitting possession, which states that possession is unwitting if the accused is not aware that the contraband is in his possession. Court's Instructions, Supp CP.

Given the complex nature of the relationship between a possession charge and the affirmative defense of unwitting possession, the prosecutor's misstatement of the law likely confused the jury. The prosecutor's misstatement regarding the law of unwitting possession was flagrant and ill-intentioned and Mr. Crawford was prejudiced. Mr. Crawford's conviction must be reversed. *Glasmann*, 175 Wn.2d at 714.

2. The prosecutor committed misconduct by misstating the law in a manner that excused the jury from finding an essential element of the crime.

Due process requires the prosecution to prove every element of a charged crime beyond a reasonable doubt. *Glasmann*, 175 Wn.2d at 713. Accordingly, a prosecutor commits misconduct by suggesting that jurors need not find a particular element in order to convict.

Where an accused person raises the defense of unwitting possession, the date and time of the alleged possession become a material element of the accusation. Otherwise, the unwitting possession defense could be defeated simply by showing that the accused person had the

requisite knowledge—including, for example, after the police find contraband about which the defendant previously knew nothing.

Unwitting possession cases are similar to cases involving an alibi. When the accused raises an alibi defense, the time and date of the alleged misconduct become essential elements of the offense, which must be proven beyond a reasonable doubt. *See e.g. State v. Mode*, 57 Wn.2d 829, 834, 360 P.2d 159 (1961); *State v. Clark*, 170 Wn. App. 166, 194, 283 P.3d 1116 (2012) *review denied* 176 Wn.2d 1028 (2013). This rule is based on the theory that the accused is prejudiced by the state's failure to prove that the offense occurred at a specific time and date when a defense that makes the time and date relevant – such as an alibi – has been raised. *Clark*, 170 Wn. App. at 194.

Similarly, when the accused raises unwitting possession, s/he is unfairly prejudiced by any attempt to shift the time at which the charge is alleged to have occurred. A claim of unwitting possession makes the time and date of the alleged possession relevant. To hold otherwise would be to permit the prosecution to nullify the defense by showing that the accused person knowingly possessed a controlled substance at any other time and place besides the one for which the accused can establish the defense.

Mr. Crawford was charged with possession of a controlled substance on or about September 5, 2012. CP 1. The state's theory throughout trial was that he constructively possessed the methamphetamine found in his shared room during a search that transpired late on the night of the 5th or in the early morning of the 6th. *See generally* RP 40-62. Mr. Crawford testified that he had purchased methamphetamine on September 4th but was unaware that any was still in his possession at the time of the search. RP 80-83. Following that testimony, the prosecutor argued that this admission was sufficient to convict Mr. Crawford for possession of a controlled substance: "He said 'yeah, that's mine. I bought it a day ago.' That's possession of a controlled substance." RP 111.

The prosecutor committed misconduct when he argued that the jury could convict Mr. Crawford based on his admission that he bought and possessed methamphetamine the previous day. RP 111. In light of Mr. Crawford's defense of unwitting possession, the time and date of his offense became material elements of the charge against him. *See e.g. Mode*, 57 Wn.2d at 834. The prosecutor misstated the law by suggesting that jurors could ignore the date and time element and convict Mr. Crawford based solely on his admission to previous unlawful conduct. *Walker*, 164 Wn. App. at 736.

The prosecutor's misconduct was flagrant and ill-intentioned and prejudicial to Mr. Crawford. *Glasmann*, 175 Wn.2d at 713. His conviction must be reversed. *Id* at 714.

III. THE ADMISSION OF IMPROPER OPINION TESTIMONY INVADED THE PROVINCE OF THE JURY AND VIOLATED MR. CRAWFORD'S RIGHT TO A JURY TRIAL.

A. Standard of Review.

Constitutional issues are reviewed *de novo*. *Bellevue School Dist. v. E.S.*, 171 Wn.2d 695, 702, 257 P.3d 570 (2011). Admission of improper opinion testimony can be manifest error affecting a constitutional right raised for the first time on appeal. *State v. Johnson*, 152 Wn. App. 924, 934, 219 P.3d 958 (2009) (Johnson I); RAP 2.5(a)(3).

B. The court erred in admitting testimony that provided an improper opinion of Mr. Crawford's guilt.

The admission of testimony providing an improper opinion of guilt violates the right of the accused to a trial by jury. U.S. Const. Amends. VI, XIV; art. I, §§ 21 and 22; *State v. Hudson*, 150 Wn. App. 646, 654, 208 P.3d 1236 (2009) (Hudson I).

An opinion is improper and inadmissible if it is an explicit or "nearly explicit" opinion on the accused person's guilt. *State v. King*, 167 Wn.2d 324, 332, 219 P.3d 642 (2009) (King II); *see also State v.*

Montgomery, 163 Wn.2d 577, 591, 183 P.3d 267 (2008) (“[T]his court has held that there are some areas which are clearly inappropriate for opinion testimony in criminal trials. Among these are opinions, particularly expressions of personal belief, as to the guilt of the defendant, the intent of the accused, or the veracity of witnesses.”). Whether other testimony constitutes an improper opinion of guilt depends on the circumstances of the case and turns on a 5-part inquiry. *Hudson*, 150 Wn. App. at 653. The reviewing court should consider: “(1) the type of witness involved, (2) the specific nature of the testimony, (3) the nature of the charges, (4) the defense, and (5) the other evidence before the trier of fact.” *Id.* Improper testimony from a law enforcement officer may be particularly prejudicial because it “carries a special aura of reliability.” *King*, 167 Wn.2d at 331.

Officer Gutierrez testified in a manner that conveyed his opinion of Mr. Crawford’s unwitting possession defense:

If [a methamphetamine user is] willing to keep it and possess it, then it’s a useable amount. If it wasn’t enough for them, they wouldn’t keep it around at the risk of getting in trouble... especially if they are on probation or parole.
RP 60.

Under the circumstances of Mr. Crawford’s case, Officer Gutierrez’s testimony constituted an impermissible opinion of guilt. *Hudson*, 150 Wn. App. at 653. The five factors outlined in *Hudson* establish that Gutierrez’s testimony was improper.

First, the jury likely considered Officer Gutierrez to be an expert on the behavior of drug users, and likely gave his testimony extra weight because he is a law enforcement officer. *King*, 167 Wn.2d at 331.

Second, Officer Gutierrez's testimony conveyed his opinion as to Mr. Crawford's state of mind. Such testimony is generally inadmissible. *See State v. Farr-Lenzini*, 93 Wn. App. 453, 970 P.2d 313 (1999).

Additionally, the improper testimony was directly relevant to the primary issue of fact at trial. Furthermore, Mr. Crawford was on probation; this fact made it clear that the officer's general statement about parolees and probationers applied to Mr. Crawford specifically. RP 41.

Third, the improper testimony was not somehow sanitized by the nature of the charge (simple possession). *Hudson*, 150 Wn. App. at 653.

Fourth, the opinion was directly relevant to Mr. Crawford's unwitting possession defense. In claiming that no drug user would possess any amount of drugs unknowingly, the officer's testimony, if believed, completely foreclosed Mr. Crawford's affirmative defense.

Fifth, Officer Gutierrez's testimony was the only evidence (other than Mr. Crawford's own testimony) that was directly relevant to the issue of unwitting possession. Because no other evidence supported the prosecution's position, the officer's improper testimony was especially prejudicial.

The court erred in permitting Officer Gutierrez to provide testimony that amounted to an improper opinion of Mr. Crawford's guilt. *Hudson*, 150 Wn. App. at 653. Mr. Crawford's conviction must be reversed. *Id.*

IV. THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY A FELONY CONVICTION BECAUSE MR. CRAWFORD POSSESSED ONLY DRUG RESIDUE.

A. Standard of Review

Constitutional questions are reviewed *de novo*. *E.S.*, 171 Wn.2d at 702. The interpretation of a statute is reviewed *de novo*, as is the application of law to a particular set of facts. *State v. Budik*, 173 Wn.2d 727, 733, 272 P.3d 816 (2012); *In re Detention of Anderson*, 166 Wn.2d 543, 555, 211 P.3d 994 (2009).

B. The court should use its common-law authority to recognize a non-statutory element in simple possession cases, allowing a felony conviction only if the prosecution proves possession of some minimum quantity of a controlled substance.

The legislature has explicitly authorized the judiciary to supplement penal statutes with the common law, so long as the court decisions are "not inconsistent with the Constitution and statutes of this state..." RCW 9A.04.060. Washington courts have the power to recognize non-statutory

elements of an offense.⁴ For example, the Supreme Court has recognized non-statutory elements in robbery cases and cases involving controlled substance cases. *In re Lavery*, 154 Wn.2d 249, 255, 111 P.3d 837 (2005); *State v. Goodman*, 150 Wn.2d 774, 786, 83 P.3d 410 (2004); *State v. Johnson*, 119 Wn.2d 143, 145, 829 P.2d 1078 (1992) (Johnson II).

Possession of a controlled substance is a strict liability offense. *State v. Denny*, No. 42447-9-III, 294 P.3d 862 (Feb. 20, 2013). Under current law, as interpreted by the Court of Appeals, a person may be convicted of a felony for possessing the smallest quantity of drug residue. RCW 69.50.4013; *State v. George*, 146 Wn. App. 906, 919, 193 P.3d 693 (2008) (“[T]here is no minimum amount of drug which must be possessed in order to sustain a conviction.”).

Thus in Washington, guilt is a function of the sensitivity of equipment used to detect controlled substances, rather than the culpability of the individual. Thus, a person who visits Washington from Florida would likely be guilty of cocaine possession upon arrival. *See, e.g., Lord v. Florida*, 616 So.2d 1065, 1066 (1993) (“It has been established by toxicological testing that

⁴ In fact, the judiciary has the power to define crimes where necessary. *See State v. Chavez*, 163 Wn.2d 262, 180 P.3d 1250 (2008) (upholding judicially created definition of assault against a separation of powers challenge). Similarly, the judiciary has the power to recognize affirmative defenses to ameliorate the harshness of criminal statutes. *See, e.g., State v. Cleppe*, 96 Wn.2d 373, 381, 635 P.2d 435 (1981) (recognizing the judicially created affirmative defense of unwitting possession).

cocaine in South Florida is so pervasive that microscopic traces of the drug can be found on much of the currency circulating in the area.”) Of course, such a person assert the affirmative defense of unwitting possession, and might achieve acquittal by convincing jurors that s/he knew nothing of the cocaine residue clinging to her or his currency (or other property). *Cleppe*, 96 Wn.2d at 381.

In most states, conviction for possession of residue is either disallowed or established only upon proof of knowing possession.⁵ *See, e.g., Costes v. Arkansas*, 287 S.W.3d 639 (2008) (Possession of residue insufficient for conviction); *Doe v. Bridgeport Police Dept.*, 198 F.R.D. 325 (2001) (possession of used syringes and needles with trace amounts of drugs is not illegal under Connecticut law); *California v. Rubacalba*, 859 P.2d 708 (1993) (“Usable-quantity rule” requires proof that substance is in form and quantity that can be used); *Louisiana v. Joseph*, 32 So.3d 244 (2010) (Cocaine residue that is visible to the naked eye is sufficient for conviction if requisite mental state established; statute requires proof that defendant “knowingly or intentionally” possessed a controlled substance); *Finn v. Kentucky*, 313

⁵ One exception is North Dakota, which permits conviction for willfully possessing residue. *State v. Christian*, 2011 ND 56, 795 N.W.2d 702, 705 (2011). In North Dakota, willfulness is defined to include recklessness. N.D. Cent. Code. § 12.1-02-02.

S.W.3d 89 (2010) (possession of residue sufficient because prosecution established defendant's knowledge); *Hudson v. Mississippi*, 30 So.3d 1199, 1204 (2010) (Hudson II) (possession of a mere trace is sufficient for conviction, if state proves the elements of "awareness" and "conscious intent to possess"); *Missouri v. Taylor*, 216 S.W.3d 187 (2007) (residue sufficient for conviction if defendant's knowledge is established); *North Carolina v. Davis*, 650 S.E.2d 612, 616 (2007) (residue sufficient if knowledge established); *Head v. Oklahoma*, 146 P.3d 1141 (2006) (knowing possession of residue established by defendant's statement); *Ohio v. Eppinger*, 835 N.E.2d 746 (2005) (state must be given an opportunity to prove knowing possession, even of a "miniscule" amount of a controlled substance); *Hawaii v. Hironaka*, 53 P.3d 806 (2002) (residue sufficient where knowledge is established); *Gilchrist v. Florida*, 784 So.2d 624 (2001) (immeasurable residue sufficient for conviction, where circumstantial evidence establishes knowledge); *New Jersey v. Wells*, 763 A.2d 1279 (2000) (residue sufficient; statute requires proof that defendant "knowingly or purposely" obtain or possess a controlled substance); *Idaho v. Rhode*, 988 P.2d 685, 687 (1999) (rejecting "usable quantity" rule, but noting that prosecution must prove knowledge); *Lord*, 616 So.2d 1065 (mere presence of trace amounts of cocaine on circulating currency insufficient to support felony conviction); *Garner v. Texas*, 848 S.W.2d 799, 801 (1993) ("When the

quantity of a substance possessed is so small that it cannot be quantitatively measured, the State must produce evidence that the defendant knew that the substance in his possession was a controlled substance”); *South Carolina v. Robinson*, 426 S.E.2d 317 (1992) (prosecution need not prove a “measurable amount” of controlled substance, so long as knowledge is established). For at least one state, knowingly and unlawfully possessing mere residue is a misdemeanor, rather than a felony. *New York v. Mizell*, 532 N.E.2d 1249, 1251 (1988).

The judiciary’s inherent authority to recognize non-statutory elements should be employed to recognize a minimum quantity required for conviction of simple possession.⁶ *Goodman*, 150 Wn.2d 774; *Cleppe*, 96 Wn.2d 373; *Chavez*, 163 Wn.2d 262. A common law element requiring proof of a minimum quantity is not inconsistent with Washington’s possession statute.⁷ RCW 69.50.4013.

If the court declines to recognize a non-statutory element requiring proof of some minimum quantity, Washington will be the only state in the

⁶ The Supreme Court has rejected a “usable quantity” test, but has never upheld a conviction based on possession of mere residue. *See State v. Larkins*, 79 Wn.2d 392, 395, 486 P.2d 95 (1971) (affirming conviction based on “a measurable amount” of Demerol.)

⁷ By contrast, some states specifically criminalize the knowing possession of even the smallest amount of a controlled substance. *See, e.g.*, KRS §218A.1415, which permits conviction for knowing possession of “*any quantity* of methamphetamine...” (emphasis added).

nation imposing felony sanctions for possession of residue absent proof of a culpable mental state. This unduly harsh result requires an expensive commitment of judicial resources, prosecution and defense costs, and the cost of incarceration. It is bad policy, especially in light of the current fiscal climate.

The only Washington cases examining the issue have concluded that the statute does not *require* proof of a minimum quantity. *State v. Smith*, 29832–9–III, 298 P.3d 785 (2013); *State v. Bennett*, 168 Wn. App. 197, 210, 275 P.3d 1224 (2012). Neither *Smith* nor *Bennett* considered the advantages and disadvantages of exercising common law authority to recognize a non-statutory element of the offense.

Nothing in Washington’s statute is inconsistent with requiring proof of a minimum quantity, in order to obtain a felony conviction for simple possession.⁸ To convict a person of simple possession under RCW 69.50.4013, the prosecution should be required to prove some quantity beyond mere residue. In light of *Larkins*, it need not be a usable quantity, but it should be at least a measurable amount. If such a common-law element is not recognized, Washington will be the only state in the nation

⁸ In some states, for example, the statute permits conviction if a person knowingly possesses “any quantity” or “any amount” of a controlled substance. *See, e.g.*, KRS §218A.1415 (“A person is guilty of possession of a controlled substance in the first degree when he knowingly and unlawfully possesses: a controlled substance that contains *any quantity* of methamphetamine...” (emphasis added)).

that permits conviction of a felony for possession of residue, without proof of knowledge.

1. Mr. Crawford's possession of mere residue does not justify a felony conviction.

Here, the prosecution did not prove that Mr. Crawford possessed more than mere residue. The forensic scientist who tested the drugs testified that the baggie found in Mr. Crawford's room contained "a residue quantity." RP 71. She estimated that the baggie contained a milligram or less of methamphetamine. RP 74. She characterized one milligram as 1/200 of the common user amount of methamphetamine of .2 grams. RP 74.

If the court recognizes a non-statutory element requiring proof of some minimum quantity beyond mere residue, Mr. Crawford's methamphetamine possession conviction would be based on insufficient evidence, in violation of his right to due process. *Smalis v. Pennsylvania*, 476 U.S. 140, 144, 106 S.Ct. 1745, 90 L.Ed.2d 116 (1986). The court should recognize such an element, reverse Mr. Crawford's conviction, and dismiss the charge with prejudice. *Id.*

V. MR. CRAWFORD WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL

A. Standard of review.

Ineffective assistance of counsel is an issue of constitutional magnitude that can be raised for the first time on appeal. *State v. Kylo*, 166 Wn.2d 856, 862, 215 P.3d 177 (2009); RAP 2.5(a). Reversal is required if counsel's deficient performance prejudices the accused person. *Kylo*, 166 Wn.2d at 862 (citing *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)).

B. Defense counsel provided ineffective assistance by failing to object to improper opinion testimony and prosecutorial misconduct.

Counsel's performance is deficient if it (1) falls below an objective standard of reasonableness based on consideration of all of the circumstances and (2) cannot be justified as a tactical decision. U.S. Const. Amend VI; *Kylo*, 166 Wn.2d at 862. The accused is prejudiced by counsel's deficient performance if there is a reasonable probability that it affected the outcome of the proceedings. *Id.*

1. Defense counsel's failure to object to Officer Gutierrez's improper opinion testimony prejudiced Mr. Crawford.

Failure to object to inadmissible evidence can constitute deficient performance. *State v. Hendrickson*, 138 Wn. App. 827, 833, 158 P.3d

1257 (2007). In *Hendrickson*, the court found prejudicial defense counsel's failure to object to hearsay evidence. The admission of the evidence violated the client's confrontation rights and provided an important link in the prosecution's case. *Id.*

Here, Mr. Crawford's trial counsel failed to object to improper opinion testimony. RP 60. As outlined above, Officer Gutierrez provided a nearly-explicit opinion on Mr. Crawford's state of mind, severely undermining his unwitting possession defense. There was no valid tactical reason for the failure to object. Instead, defense counsel simply failed to protect his client from the impermissible opinion testimony. Because the improper testimony related directly to the primary issue at trial and provided strong evidence undermining the unwitting possession defense, counsel's failure to project prejudiced Mr. Crawford.

2. Defense counsel's failure to object to prosecutorial misconduct in closing prejudiced Mr. Crawford.

Failure to object to improper closing arguments is objectively unreasonable under most circumstances:

At a minimum, an attorney who believes that opposing counsel has made improper closing arguments should request a bench conference at the conclusion of the opposing argument, where he or she can lodge an appropriate objection out [of] the hearing of the jury.... Such an approach preserves the continuity of each closing argument, avoids calling the attention of the jury to any improper statement, and allows the trial judge the opportunity to make an appropriate curative instruction or, if necessary, declare a mistrial.

Hodge v. Hurley, 426 F.3d 368, 386 (6th Cir., 2005).

Here, counsel also failed to object to prosecutorial misconduct in closing. As noted above, the prosecutor misstated the law, contradicting the court's instructions on unwitting possession and urging the jury to vote guilty even if the prosecution failed to prove possession on the date specified in the instructions.

Counsel's failure to object cannot be characterized as a tactical decision. The defense gained no benefit from allowing the prosecution to misstate the law. At a minimum, the lawyer should have either requested a sidebar or lodged an objection when the jury left the courtroom. *Id.*

Counsel's deficient performance prejudiced Mr. Crawford. The prosecutor's misconduct directly undermined the entire defense theory—that Mr. Crawford did not know he was in possession of methamphetamine at the time of the search, when officers discovered residue in a baggie under a blanket on his bed.

The prosecutor's misstatements likely confused jurors, resulting in a guilty verdict even if they believed Mr. Crawford did not know he was in possession of a controlled substance. The conviction must be reversed and the case remanded for a new trial. *Hendrickson*, 138 Wn. App. at 833.

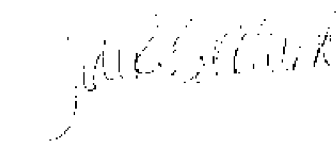
CONCLUSION

Mr. Crawford's possession conviction should be reversed and the case dismissed with prejudice. The court should recognize a non-statutory element requiring proof of more than mere residue, and find the evidence insufficient to meet that standard.

In the alternative, the case must be remanded for a new trial. First, Mr. Crawford was denied his right to a unanimous verdict by the court's failure to give a unanimity instruction. Second, the prosecutor committed prejudicial misconduct that was flagrant and ill-intentioned by misstating the law during closing argument. Third, the conviction was based in part on improper opinion evidence that invaded the province of the jury. Fourth, defense counsel provided ineffective assistance of counsel.

Respectfully submitted on June 19, 2013,

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CERTIFICATE OF SERVICE

I certify that on today's date:

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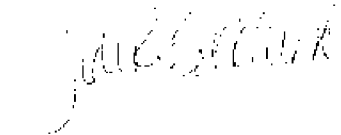
With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on June 19, 2013.



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BACKLUND & MISTRY

June 19, 2013 - 4:24 PM

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